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No. 93-

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1993

ERIC C. WOODS,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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Questions Presented.

1. Whether the trial de novo of petitioner Woods on two counts of vehicular homicide by negligent operation, pursuant to Massachusetts' "two-tier" system for trying certain crimes, violated the double jeopardy prohibition of the Fifth Amendment in light of this Court's decision in *Grady* v. *Corbin*, 495 U.S. 508 (1990), where the Commonwealth proved at Woods' jury trial the entirety of conduct for which Woods was acquitted at a prior bench trial — operating under the influence of alcohol and two counts of vehicular homicide while under the influence of alcohol and by negligent operation — to establish an essential element of the vehicular homicide charges.

2. Whether the principles of collateral estoppel required the exclusion of intoxication evidence at Mr. Woods' jury trial since the issue of whether Woods' intoxication caused the accident was determined in Woods' favor at the prior bench trial, and the intoxication evidence may have constituted the entirety of the negligence element of the vehicular homicide charges.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Eric C. Woods, respectfully requests that a Writ of Certiorari be issued to review a judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts entered in the above-captioned proceeding on February 18, 1993.[1]

Opinions Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 414 Mass. 343 (1993) and is reprinted in Petitioner's Appendix at pp. A1-A17.

[1] The parties to the proceeding in the Supreme Judicial Court for the Commonwealth of Massachusetts were those parties named in the caption of the case in this Court.

The Worcester District Court for the Commonwealth of Massachusetts (Zide, J., at trial and sentencing) wrote an opinion relevant to the issues raised in this petition and is reprinted in Petitioner's Appendix at pp. A18-A21.

Jurisdiction.

Judgment was entered against petitioner in the Worcester District Court after a jury trial on June 5, 1991. The Supreme Judicial Court for the Commonwealth of Massachusetts affirmed this judgment on February 18, 1993. This Court has jurisdiction to review the judgment of the Supreme Judicial Court under 28 U.S.C. § 1257.

Constitutional and Statutory Provisions Involved.

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section I:

> All persons born or naturalized in the United States, and Subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

> they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts General Laws, chapter 90 § 24G:

§ 24G(a). Homicide by a motor vehicle while under the influence of an intoxicating substance.

> Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which the members of the public have access as invitees or licensees, operates a motor vehicle while under the influence of intoxicating liquor . . . and so operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered, and by any such operation so described causes the death of another person, shall be guilty of homicide by a motor vehicle while under the influence of an intoxicating substance, and shall be punished by imprisonment in the state prison for not less than two and one-half years or more than fifteen years and a fine of not more than five thousand dollars, or by imprisonment in a jail or house of correction for not less than one year nor more than two and one-half years and a fine of not more than five thousand dollars. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, or furlough or receive any deduction from his

sentence until such person has served at least one year of such sentence. . . .

§ 24G(b). Homicide by a motor vehicle.

(a) Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which the members of the public have access as invitees or licensees, operates a motor vehicle while under the influence of intoxicating liquor . . . or whoever operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered and by such operation causes the death of another person, shall be guilty of homicide by a motor vehicle and shall be punished by imprisonment in a jail or house of correction for not less than thirty days nor more than two and one-half years, or by a fine of not less than three hundred nor more than three thousand dollars, or both.

Massachusetts General Laws, chapter 90, § 24:

§ 24(1)(a)(1). Driving under the influence of intoxicating liquor.

Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensess, operates a motor vehicle while under the influence of intoxicating liquor . . . shall be punished by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment for not more than two years, or both.

Massachusetts General Laws, chapter 218 § 26A:

§ 26A. Trial of jury of six; waiver.

> Trial of criminal offenses in the Boston municipal court department and in the divisions of the district court department shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to section twenty-seven A. Such waiver shall not be received unless the defendant is represented by counsel or has filed a written waiver of counsel. Such trials by jury in the first instance shall be in those jury sessions designated by said section twenty-seven A for the hearing of such appeals. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance.

Massachusetts General Laws, chapter 218 § 27A:

§ 27A: Appeals; jury-of-six sessions.

> (a) Every division of the district court department is authorized to hold jury-of-six sessions for the purpose of hearing appeals by defendants found guilty in the several divisions of criminal offenses over which the district courts have original jurisdiction under the provisions of section twenty-six . . .
>
> (b) The administrative justice for the district court department shall designate at least one division in each county for the purpose of hearing cases appealed to a jury of six . . .

(c) A defendant found guilty in any division of the district court department may appeal to a jury-of-six session in the same division . . .

(d) The justice presiding over a jury-of-six session shall have all the powers and duties which a justice sitting in the superior court department has and may exercise in the trial and disposition of criminal cases including the power to report questions of law to the appeals court, but in no case may he impose a sentence to the state prison. No justice so sitting shall act in a case in which he has sat or held an inquest or otherwise taken part in any proceeding therein.

(e) Trials by juries of six shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all the defendants in the case are entitled.

(f) For the jury-of-six sessions, the superior court shall make available jurors from the pools for the jury sessions in either civil or criminal sessions in the superior court.

(g) The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in all cases. The administrative justices for the district court department and the Boston municipal court department shall arrange for the sittings of the jury sessions of their respective departments and shall assign justices thereto, to the end that speedy trials may be provided for such appeals. Review may be had directly by the appeals

> court, by appeal, report or otherwise in the same manner provided for trials of criminal cases in the superior court. The defendant may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three. . . .

Statement of the Case.

Under Massachusetts law, a defendant charged with certain crimes in the district court can elect either a bench trial or a jury trial. Mass. Gen. Laws c. 218, § 26A. If a defendant chooses a jury and is convicted, he has the normal appellate process open to him, while a defendant dissatisfied with the results of a bench trial, if he elects that course, has an absolute right to a trial *de novo* before a jury. §§ 26A and 27A.[2] A convicted defendant who has chosen a bench trial need not allege error at that trial to obtain *de novo* review. However, he may not rely upon error at the bench trial to obtain reversal of his conviction; his only recourse is a trial de novo.

Petitioner Eric Woods was arrested following a single-car accident occurring at 12:52 A.M., on November 17, 1989, in Dudley, Massachusetts, in which two persons, Jonathan Edgerly and Patrick Donnelly, were killed. After drinking at a local establishment, Woods, Edgerly, Donnelly, and Todd Gillis entered a Ford Bronco motor vehicle belonging to Woods' father. Todd Gillis was speaking to two witnesses about three to five minutes before the accident, and was observed at that time to be the driver of the vehicle. Not long after that, the motor vehicle went off the road and struck a tree. When help arrived, Edgerly and Donnelly were found dead in the back seat of the vehicle. Woods and Gillis were seriously injured. They were taken by police and emergency

[2] At the second-tier trial, a defendant may waive a jury and undergo a second bench trial. Mass. Gen. Laws, c. 218, § 27A(g).

personnel to a hospital for treatment of their injuries. At the hospital, Woods disclosed to emergency personnel that he had drunk some beer earlier that evening. His blood alcohol level was tested, and it registered .03 several hours after the incident.[3]

Woods was originally charged on March 27, 1990, in the Dudley District Court in a seven-count complaint with the following motor vehicle offenses: (a) operating under the influence of alcohol; (b) and (c), two counts of vehicular homicide while under the influence of alcohol and by negligent operation; (d) and (e), two counts of vehicular homicide by negligent operation, only; (f) operating to endanger; and (g) operating after the suspension of his license. Woods elected to undergo a first-tier bench trial. On September 27, 1990, the trial judge found Woods not guilty of counts (a), (b) and (c), all of which charged the involvement of alcohol.[4] The trial judge found Woods guilty, however, of counts (d) and (e) alleging vehicular homicide by negligent operation, and guilty of count (g) alleging operating after suspension of his license. Woods was sentenced to concurrent, 2½ year House of Correction sentences on the vehicular homicide convictions and a consecutive one-year House of Correction sentence on the operating after suspension conviction. The trial judge dismissed count (f) alleging operating to endanger on the ground of duplicity.

Woods requested a trial *de novo* in the jury session of the Worcester District Court, Central Division. Pending his jury trial, he was released on personal recognizance. Before the jury trial commenced, Woods filed a motion *in limine* requesting that

[3] Under Massachusetts law, a blood alcohol level below five one-hundredths (.05) entitles the defendant to a presumption that he was not under the influence of intoxicating liquor. Mass. Gen. Laws c. 90, § 24(1)(e) (1990 ed.).

[4] In finding the defendant not guilty of the offenses involving alcohol, the bench trial judge stated in open court that the Commonwealth had not proved beyond a reasonable doubt that the defendant was under the influence of alcohol at the time of the accident.

the Commonwealth be precluded from offering any evidence pertaining to Woods' alleged alcohol consumption. In his moving papers, Woods argued that previously he had been acquitted of all alcohol-related charges at his bench trial, and thus principles of double jeopardy and collateral estoppel precluded the introduction of alcohol-related conduct at the jury trial. On May 3, 1991, the trial judge issued its findings and rulings denying the motion *in limine*. A18-A21.

On June 5, 1991, after a five-day jury trial in the Worcester District Court, Woods was found guilty of the three remaining counts. Woods was sentenced to concurrent, two-year House of Correction sentences on the vehicular homicide convictions and a consecutive sixty-day sentence on the operating after suspension conviction. Woods appealed these convictions. Woods moved that execution of his sentence be stayed pending the appeal, but his request was denied and Woods served his sentence.

The Supreme Judicial Court, on its own initiative, transferred the case from the Massachusetts Appeals Court. On appeal, Woods argued, among other things: 1) his prosecution on two counts of vehicular homicide by negligent operation violated the double jeopardy prohibition of the Fifth Amendment in light of this Court's decision in *Grady* v. *Corbin*, 495 U.S. 508 (1990), since the Commonwealth proved at his jury trial the entirety of conduct for which he was acquitted at a prior bench trial — operating under the influence of alcohol and two counts of vehicular homicide while under the influence of alcohol and by negligent operation — to establish an essential element, negligence, in support of the vehicular homicide charges; 2) principles of collateral estoppel, as articulated by this Court's decision in *Ashe* v. *Swenson*, 397 U.S. 446 (1970), required the exclusion of intoxication evidence at Woods' jury trial since the issue of whether Woods' intoxication caused the accident was determined by Woods' favor at the prior bench trial.

The Supreme Judicial Court affirmed Woods' convictions, finding his double jeopardy and collateral estoppel claims to be without merit. The court rejected the double jeopardy challenge for two reasons. First, the Massachusetts court held that *Grady* did not bar Woods' prosecution because the Commonwealth offered evidence concerning alcohol "not to show that he drove while under the influence of alcohol or that he was legally 'intoxicated,' but to prove that he had been drinking before the accident as evidence of negligent operation of a motor vehicle." 414 Mass. at 350. The court found that Woods had misapplied *Grady*, which concededly rejected a "same evidence" test, because the Commonwealth had used the same evidence to prove Woods' *negligent* conduct — *not* his *intoxication*. 414 Mass. at 347, 350. Although the evidence presented at both trials was the same, the court concluded "the specific conduct at issue was not." 414 Mass. at 351. Second, the Massachusetts court held that Woods' subsequent prosecution was not barred by the double jeopardy clause because, under the Massachusetts two-tier system, a defendant convicted of charges in the first-tier trial remains in "continuing jeopardy" until judgment is final in the second-tier trial. 414 Mass. at 351. In this regard, the court reasoned that, unlike the defendant in *Grady* who faced two separate prosecutions, Woods faced only one prosecution. The court stated, "Woods was not prosecuted twice but, rather, he himself chose to be tried again in the hope of securing acquittals to replace previous convictions." 414 Mass. at 352.

The Massachusetts court also rejected Woods' collateral estoppel claim, holding that "the only issue of fact foreclosed by the first trial was whether the defendant was driving while intoxicated." 414 Mass. at 353-354. Construing Woods' claim in a technical fashion, the court reasoned that the charges of negligent operation and driving while under the influence "involve distinctly different factual issues," and that a jury "could

have reasonably inferred negligence from the circumstances of the accident as well as from evidence that the defendant was drinking without reaching further to decide whether or not he was intoxicated." 414 Mass. at 354.

Reasons for Granting the Writ.

I. THE COURT SHOULD SETTLE THE QUESTION OF WHETHER THE TRIAL DE NOVO OF A DEFENDANT UNDER MASSACHUSETTS' TWO-TIER SYSTEM VIOLATES THE DOUBLE JEOPARDY PROHIBITION OF THE FIFTH AMENDMENT IN LIGHT OF THIS COURT'S DECISION IN *Grady* v. *Corbin*, 495 U.S. 508 (1990), WHERE THE PROSECUTION PROVES THE ENTIRETY OF CONDUCT FOR WHICH THE DEFENDANT WAS ACQUITTED AT A PRIOR BENCH TRIAL TO ESTABLISH AN ESSENTIAL ELEMENT OF THE SECOND CRIME.

This Court has never addressed whether in light of its decision in *Grady* v. *Corbin*, 495 U.S. 508 (1990), the trial *de novo* of a defendant under Massachusetts' two-tier system violates the double jeopardy prohibition of the Fifth Amendment where the prosecution proves the entirety of conduct for which a defendant was acquitted at a prior bench trial to establish an essential element of the crime. Because the Supreme Judicial Court's decision rejecting Woods' double jeopardy claim conflicts with this Court's decision in *Grady*, and concerns an important question of federal law, the Court should grant the writ of certiorari.

Grady announced a new "same conduct" test for double jeopardy claims arising in the context of successive prosecutions, holding that a subsequent prosecution would be barred, "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U.S. at 510.

In *Grady*, the defendant Corbin drove his car across the center line of a highway while intoxicated, killing the driver of an oncoming vehicle. Through an oversight in the prosecutor's office, Corbin was originally charged and convicted of the misdemeanors of driving while intoxicated and failing to keep right of the median. When the state later indicted Corbin for vehicular homicide, it stated in a bill of particulars that it would establish Grady's guilt by proving his intoxication at the time of the accident, his failure to keep right of the median, and the fact that he was driving too fast for the weather conditions. The state admitted, therefore, that it would attempt to prove conduct for which Corbin had already been prosecuted (driving while intoxicated and crossing the center line) in order to establish the negligent or reckless acts necessary for a homicide conviction. The Court held that double jeopardy principles barred the second prosecution since the state would "prove conduct that constitutes an offense for which the defendant has already been prosecuted" in order to establish an essential element of the subsequent offense.[5]

Applying a *Grady* analysis to the facts of this case, the Commonwealth introduced the following evidence in order to prove the element of negligence: (1) evidence that the vehicle went off the road and was travelling approximately 72 miles per hour at the time of impact; and (2) evidence of Woods' intoxication,

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[5] In announcing its new rule, *Grady* adopted the "suggestion" set forth in *Illinois* v. *Vitale*, 447 U.S. 410 (1980), a case involving a defendant, Vitale, who was charged with two counts of involuntary manslaughter based on his reckless driving. Vitale previously was convicted of a traffic infraction charging him with failure to reduce speed to avoid an accident and was ordered to pay a $15 fine. Justice White, writing for this Court, commented that even though the subsequent prosecution was not barred under the *Blockburger* test, "[I]t may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on such conduct necessarily involving such failure . . . In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial . . ." 447 U.S. at 420.

including testimony that Woods had been drinking at a local establishment prior to the accident, Woods' statement to emergency personnel that he had drunk some beer earlier that evening, and Woods' .03 blood alcohol level several hours after the accident. In this case, therefore, the prosecution did exactly what was proscribed in *Grady*: it proved the entirety of the conduct for which Woods was previously prosecuted — operating under the influence of alcohol (Mass. Gen. Laws, c. 90, § 24) and vehicular homicide while under the influence of alcohol and by negligent operation (Mass. Gen. Laws, c. 90, § 24G(a)).[6]

In its decision, the Supreme Judicial Court held that *Grady* did not proscribe Woods' prosecution because the Commonwealth merely introduced intoxication evidence to prove Woods' negligent conduct, *not* his alcohol-related conduct. In this regard, the Massachusetts court noted that the *Grady* Court reaffirmed its previous position, "that the presentation of specific evidence in one trial does not forever bar the government from introducing the same evidence in a subsequent proceeding." *Commonwealth* v. *Woods*, 414 Mass. at 347, *quoting Grady* v. *Corbin*, 495 U.S. at 521-522, citing *Dowling* v. *United States*, 493 U.S. 342 (1990). The semantic distinction the Massachusetts court draws between "conduct" and "evidence" is confusing, and ultimately, unpersuasive in light of this Court's holding in *Grady*. Although the *Grady* Court admittedly stated the presentation of evidence in one trial would not forever bar its use in a later proceeding, it certainly did not intend to dilute the force of its own ruling barring proof of conduct constituting an offense for which the defendant had

[6] The Commonwealth may have been able to prosecute Woods for vehicular homicide if it simply had agreed not to introduce evidence of intoxication — conduct for which Woods had been prosecuted and acquitted. *Grady* emphasized the state could have prosecuted Corbin for vehicular homicide if it had relied only on conduct for which Corbin had not previously been prosecuted, for example, his driving too fast for road conditions.

been prosecuted. Indeed, in *Grady*, like here, the prosecution sought to introduce intoxication evidence to prove the negligent or reckless acts necessary to support the vehicular homicide charges despite the fact that the defendant previously had been prosecuted for the offense of driving while intoxicated. Regardless of the label attached by the Massachusetts court — be it negligent "acts," "conduct," or "evidence" — the *Grady* facts are identical in all material respects to the facts of this case. Thus, the Massachusetts court's decision, if let stand, will effectively eviscerate the Court's holding in *Grady*.

United States v. *Felix*, ___ U.S. ___, 112 S.Ct. 1377 (1992), relied upon by the Supreme Judicial Court in its decision, is not controlling. There, this Court declined to apply *Grady* to a conspiracy prosecution even though certain of the overt acts relied upon by the Government were based upon substantive offenses for which the defendant had been previously convicted. When faced with the necessity of reconciling *Grady* in the context of the subsequent conspiracy prosecution, the Court reaffirmed the "established doctrine that a conspiracy to commit a crime is a separate offense from the crime itself." *Felix*, 112 S.Ct. at 1385. The *Felix* Court carved out an exception to the *Grady* rule which, of course, is not controlling here because a conspiracy prosecution is not involved.

Nor does this Court's decision in *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294 (1984), defeat Mr. Woods' double jeopardy claim. In *Lydon*, the Court held that petitioner Lydon's retrial *de novo* under the Massachusetts two-tier system did not violate the double jeopardy clause despite Lydon's claim that the evidence adduced at his bench trial was insufficient to support his conviction for possession of burglarious tools with intent to commit larceny. Lydon argued he *ought* to have been acquitted because the evidence at his bench trial was insufficient, but the bench trial judge rejected his claim in convicting Lydon, and no appellate court had ruled that the

evidence was insufficient. Important for present purposes is the *Lydon* Court's discussion of the different impact that an acquittal, rather than a conviction, would have for double jeopardy purposes:

> In *Price* v. *Georgia*, 398 U.S. 323, 329 (1970), we recognized that implicit in the *Ball* rule permitting retrial after reversal of a conviction is the concept of "continuing jeopardy." . . . [citation omitted] . . . That principle "has application where criminal proceedings against an accused have not run their full course." 398 U.S. at 326. Interests supporting the continuing jeopardy principle involve fairness to society, lack of finality, and limited waiver. *Id.* at 329, n.4. *Acquittals, unlike convictions, terminate the initial jeopardy. This is so whether they are "express or implied by a conviction on a lesser included offense." In Burks [v. United States], 437 U.S. 1 (1978), we recognized that an unreversed determination by a reviewing court that the evidence was legally insufficient likewise served to terminate the initial jeopardy.*

466 U.S. at 308-309. (Emphasis added).[7]

The *Lydon* Court then went on to discuss the central failing of Lydon's appeal: Lydon could not point to any stage in the state court proceedings which could be held to have terminated jeopardy.

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[7] *Burks* concerned a petitioner's conviction which had been set aside by the Court of Appeals on the ground that there had been an insufficiency of evidence at trial to support conviction. When the Court of Appeals remanded the case to the District Court for a determination of whether to order a new trial or to direct a verdict of acquittal, the Supreme Court reversed, holding that the appellate court's determination that the trial evidence was insufficient terminated jeopardy, and *mandated* the entry of a verdict of acquittal.

> We assume, without deciding, that jeopardy attached at the swearing of the first witness at Lydon's bench trial. The question then is whether jeopardy terminated. Lydon's double jeopardy argument requires an affirmative answer to that question, *but he fails to identify any stage of the state proceedings that can be held to have terminated jeopardy*. Unlike Burks, who could rest his claim upon the appellate court's determination of insufficiency, Lydon is faced with the unreversed determination of the bench trial judge, contrary to Lydon's assertion, that the prosecution had met its burden of proof. We noted in *United States* v. *Martin Linen Supply Co.*, *supra*, 430 U.S. at 571, that *an acquittal "represents a resolution, correct or not, of some or all of the factual elements of the offense charged." Lydon's claim of evidentiary failure and a legal judgment to that effect therefore have different consequences under the Double Jeopardy Clause*.

466 U.S. at 309. (Emphasis added).

In this case, by contrast, Woods can point to his bench trial acquittal on all alcohol-related offenses as the point at which jeopardy terminated, just as the defendant in *Burke* could point to the Court of Appeals' determination of insufficiency of the trial evidence. Having been acquitted at the bench trial of all alcohol-related charges, *Grady* proscribed the prosecution's subsequent reliance on Woods' alcohol-related conduct in proving the negligence element of the vehicular homicide charges at Woods' retrial *de novo*.

II. This Court Should Resolve the Conflict in the State Supreme Courts Over Whether the Principle of Collateral Estoppel in a Criminal Proceeding, as Articulated by This Court in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), Requires the Exclusion of Evidence of Crimes of Which the Defendant Previously Has Been Acquitted Where It Could Establish an Element of the Charged Offense and Form the Basis for Conviction.

Collateral estoppel is a protection included in the Fifth Amendment guarantee against double jeopardy. *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). In *Ashe*, the Court enunciated the standard to be applied when analyzing a collateral estoppel claim:

> . . . [T]he rule of collateral estoppel is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. Any test more technically restrictive would, of course, simply amount to a rejection

> of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

397 U.S. at 443-444. In *Ashe*, the defendant was prosecuted for and acquitted of the robbery of one of six men in attendance at a poker game in a basement. The State of Missouri then sought to reprosecute Ashe for the robbery of one of the other poker players. Applying the test set forth above, the Court ruled that collateral estoppel barred the subsequent prosecution because the jury verdict from the first trial clearly evinced a jury determination that Ashe was *not* one of the robbers. In so ruling, the Court held the federal rule of collateral estoppel was applicable to the states on the authority of *Benton* v. *Maryland*, 395 U.S. 784 (1969) and *North Carolina* v. *Pearce*, 395 U.S. at 445-446 (1969).

At least two state supreme courts and one state appellate court have interpreted the *Ashe* Court's collateral estoppel prohibition to bar the introduction of evidence of crimes of which the defendant has previously been acquitted if it "would establish an element of the charged offense and could therefore form the basis for conviction . . ." *State* v. *Paro*, 233 Conn. 384, 409 (1992), *cert. denied*, ___ U.S. ___ (March 8, 1993), quoting A. Poulin, "Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal," 58 U.Cin.L.Rev. 1, 33 (1989). *Eatherton* v. *State*, 810 P.2d 93, 103-104 (Wyo. 1991); *Maryland* v. *Baxter*, 92 Md. App. 213 (1992). In *Paro*, for example, the Connecticut Supreme Court observed that preclusion of evidence in such cases is necessary because it is possible "the second jury will convict the defendant solely on the basis of conduct that the first jury had found not to be proven beyond a reasonable doubt . . . 'Collateral estoppel should protect the defendant against that risk . . .'" 233 Conn. at 408-409, quoting A. Poulin, "Collateral Estoppel," p. 23. Echoing these

sentiments, Judge Newman filed a concurring opinion in the Second Circuit's decision in *United States* v. *Calderone*, 917 F.2d 717 (2d Cir.), *vacated* and *remanded*, ___ U.S. ___, 112 S.Ct. 1657 (1992), upholding a claim of double jeopardy by a divided vote, in which he concluded that the *Grady* decision bars a subsequent prosecution when previously prosecuted conduct "is or may constitute the entirety of an element of the second crime." 917 F.2d at 724 (Newman, J., concurring) (emphasis added in part).

By contrast, the Supreme Judicial Court's decision in this case held that collateral estoppel did *not* bar Woods' subsequent prosecution, even though it was possible that evidence of previously prosecuted conduct resolved in Woods' favor might have formed the basis for the entirety of an essential element of the crimes for which Woods was convicted. *Commonwealth* v. *Woods*, 414 Mass. at 354. More specifically, in convicting Woods, the jury may have based its finding of negligence solely on the alcohol-related conduct for which Woods previously was acquitted. Moreover, the court's hypertechnical analysis of Woods' collateral estoppel claim runs afoul of the Court's mandate in *Ashe* that such claims be analyzed with "realism and rationality." *Ashe* v. *Swenson*, 397 U.S. at 443-444. In finding the defendant not guilty of the offenses involving alcohol, the bench trial court stated that the Commonwealth had not proved beyond a reasonable doubt the defendant was under the influence of alcohol at the time of the accident. Any fair view of the record requires the conclusion that the bench trial judge determined that Woods' alcohol-related conduct played no part in the crimes charged, and thus, such evidence should not have been admitted at Woods' subsequent jury trial.

In the public interest, this Court should resolve the conflict in the state supreme and appellate courts over whether collateral

estoppel in a criminal proceeding requires the exclusion of evidence of crimes of which the defendant previously has been acquitted when such evidence might constitute the entirety of an essential element of the second crime.

Conclusion.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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May 1993

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Appendix A

Opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts dated February 18, 1993 A1

Appendix B

Findings and Rulings regarding Defendant's motions *in limine* by the trial judge A18

COMMONWEALTH vs. ERIC C. WOODS.

Worcester. January 7, 1993. - February 18, 1993.

Present: LIACOS, C.J., WILKINS, ABRAMS, NOLAN, & GREANEY, JJ.

Constitutional Law, Double jeopardy. *Collateral Estoppel*. *Practice, Criminal*, Double jeopardy, Collateral estoppel, Lesser included offense, "Two-tier" court system, Conduct of prosecutor. *Motor Vehicle*, Operation, Ownership, Homicide. *Evidence*, Ownership, Inference, Judicial discretion.

Discussion of *Grady* v. *Corbin*, 495 U.S. 508 (1990), and other cases, with respect to principles of double jeopardy applicable to evidence presented in a criminal prosecution. [345-349]

At the de novo trial of two counts of vehicular homicide by negligent operation, conducted after the defendant had been acquitted at a bench trial of two counts of vehicular homicide while under the influence of alcohol arising out of the same circumstances, principles of double jeopardy, enunciated in *Grady* v. *Corbin*, 495 U.S. 508 (1990), did not bar introduction of evidence of the defendant's consumption of alcohol before the fatal accident [349-351]; furthermore, double jeopardy principles did not apply to a defendant's appeal under the de novo trial system [351-353].

Principles of collateral estoppel did not bar the introduction of evidence of the defendant's consumption of alcohol before a motor vehicle accident at the de novo trial of two counts of vehicular homicide by negligent operation, conducted after the defendant's acquittal at a bench trial of two counts of vehicular homicide while under the influence of alcohol arising out of the same circumstances. [353-354]

At a criminal trial, there was ample evidence that the defendant was the operator of a motor vehicle to support the jury's verdicts of guilty of two counts of vehicular homicide and a charge of operation after suspension of license. [354-355]

At a criminal trial, the judge made no errors in his rulings with respect to the admission or exclusion of certain evidence. [355-357]

At a criminal trial, statements and actions by the prosecutor during closing arguments did not amount to prosecutorial misconduct requiring a mistrial. [357-358]

COMPLAINT received and sworn to in the Dudley Division of the District Court Department on March 27, 1990.

On appeal to the jury session of the Worcester Division, pretrial motions were heard by *Elliott L. Zide*, J., and the case was tried before him.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Donald A. Harwood (*Conrad W. Fisher* with him) for the defendant.

Michael Edmond Donnelly, Assistant District Attorney, for the Commonwealth.

NOLAN, J. The defendant, Eric C. Woods, appeals from convictions on two separate counts of vehicular homicide by negligent operation,[1] G. L. c. 90, § 24G (*b*) (1990 ed.), and one count of operating a motor vehicle after the suspension of a license pursuant to G. L. c. 90, § 24N (1990 ed.). We transferred this case on our own motion, and we now affirm the convictions.

Defendant's convictions stem from a motor vehicle accident in which two people were killed. The accident occurred at 12:52 A.M. on November 17, 1989, in Dudley. After drinking at a local establishment, Jonathan Edgerly, Patrick Donnelly, Todd Gillis, and the defendant entered a Ford Bronco motor vehicle belonging to the defendant's father. Not long after that, the motor vehicle careened off the road and struck a tree. When help arrived, they found Edgerly and Donnelly dead in the back seat of the vehicle. In the front seat, both Gillis and Woods were seriously injured. They were taken by police and emergency personnel to a hospital for treatment of

[1]General Laws c. 90, § 24G (*b*) (1990 ed.), reads in part: "Whoever, upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered and by any such operation causes the death of another person, shall be guilty of homicide by a motor vehicle and shall be punished by imprisonment in a jail or house of correction for not less than thirty days nor more than two and one-half years, or by a fine of not less than three hundred nor more than three thousand dollars, or both."

their injuries. At the hospital, Woods disclosed to the emergency personnel that he had drunk some beer earlier in the evening. His blood alcohol level was tested, and it registered .03 several hours after the incident.[2]

Woods was charged in the District Court with (1) operating under the influence of alcohol in violation of G. L. c. 90, § 24; (2) two separate counts of vehicular homicide while under the influence of alcohol under G. L. c. 90, § 24G; (3) two separate counts of vehicular homicide by negligent operation in violation of G. L. c. 90, § 24G (*a*); (4) operating to endanger in violation of G. L. c. 90, § 24; and (5) operating after the suspension of his license pursuant to G. L. c. 90, § 24N. After opting for a bench trial, Woods was found guilty only on the counts in (3) and (5), above. As to the counts in (1) and (2), Woods was found not guilty. The remaining charge, operating to endanger, was dismissed as duplicative.

The defendant then exercised his right to trial de novo pursuant to G. L. c. 218, § 26A (1990 ed.). He filed two motions in limine. The first requested that the Commonwealth be precluded from offering any evidence pertaining to his alcohol consumption on the ground that he had been acquitted of all alcohol-related charges at the bench trial. The second motion requested that the Commonwealth be precluded from offering any evidence regarding ownership of the Ford Bronco by the defendant's father on the ground that such evidence would be unfairly prejudicial to the defendant on the issue of who was operating the vehicle at the time of the accident. The trial court judge denied both motions. A jury-of-six found the defendant guilty on the same counts. He filed a timely appeal.

The defendant alleges several errors in his appeal. We shall address each point seriatim.

[2]We note that a blood alcohol level at or below five one-hundredths (.05) entitles the defendant to a presumption that he was not under the influence of intoxicating liquor. G. L. c. 90, § 24 (1) (*e*) (1990 ed.).

1. *Double jeopardy*. The Fifth Amendment to the United States Constitution prohibits the Federal government from subjecting a defendant to more than one prosecution for the same offense.[3] This prohibition was extended to the State governments through the due process clause of the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969). Although not expressly included in the Massachusetts Declaration of Rights, the guarantee against double jeopardy has long been recognized as part of our common law, see *Thames* v. *Commonwealth*, 365 Mass. 477, 479 (1974), and our statutory law, see G. L. c. 263, § 7 (1990 ed.). The defendant contends that his prosecution in the second trial was barred on double jeopardy grounds under the "same conduct" test announced in *Grady* v. *Corbin*, 495 U.S. 508 (1990). In *Grady*, *supra* at 510, the United States Supreme Court held that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[4] To establish that he had committed vehicular homicide by negligent operation of a motor vehicle, Woods argues that the Commonwealth proved conduct for which he had already faced prosecution, namely, driving while intoxicated. Woods concludes that in light of *Grady* the trial court should have excluded any evidence relating to the influence of alcohol. The failure of the trial court to exclude such evidence, Woods maintains, subjected him to double jeopardy.[5]

[3]The double jeopardy clause of the Fifth Amendment to the United States Constitution provides "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

[4]The *Grady* test effectuates three protections embodied in the double jeopardy clause: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Grady*, quoting *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969).

[5]Double jeopardy protection applies equally to bench and jury trials. *United States* v. *Morrison*, 429 U.S. 1, 3 (1976).

We conclude that the defendant has misinterpreted the holding in *Grady* and misapplied it to the facts of his case. Essentially, the defendant interprets *Grady* as precluding from use in a subsequent trial any evidence that was used to support the prosecution's case in the original trial. This interpretation, however, finds no support in the language of *Grady* decision. The *Grady* Court explicitly refused to adopt an "actual evidence" or "same evidence" test for double jeopardy. *Id.* at 521.[6] Instead, the Court reaffirmed its previous position that "the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding." *Id.* at 521-522, citing *Dowling* v. *United States*, 493 U.S. 342 (1990). The *Grady* Court's disavowal of the "same evidence" test was reiterated most recently in *United States* v. *Felix*, 112 S. Ct. 1377, 1382 (1992). On the other hand, the *Grady* Court noted that "a State cannot avoid the dictates of the double jeopardy clause merely by altering in successive prosecutions the evidence offered to prove the same conduct." *Grady*, *supra* at 522. The Court explained that "the critical inquiry is what *conduct* the State will prove, not the *evidence* the State will use to prove that conduct" (emphasis added). *Id.*

In *Grady*, the defendant pleaded guilty to driving while intoxicated and failure to keep right of the median strip. *Id.* at 512-513. In a subsequent prosecution, the State sought to use proof of this same *conduct*, driving while intoxicated and failure to keep right of the median strip, to prove vehicular homicide by operation of a motor vehicle in a criminally negligent and reckless manner. *Id.* at 514. The prosecution admitted that it would prove "the entirety of the conduct for

[6]The *Grady* Court also noted that the older *Blockburger* test for double jeopardy, see *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), "has nothing to do with the evidence presented at trial," *supra* at 521 n.12. The Court went on to say that "[a] true 'same evidence' test would prevent the government from introducing in a subsequent prosecution any evidence that was introduced in a preceding prosecution. It is in this sense that we discuss, and do not adopt, a 'same evidence' or 'actual evidence' test." *Id.*

which [the defendant] was convicted . . . to establish the essential elements of the homicide and assault offenses." *Id.* at 523. In other words, the prosecution in the second trial attempted to use the same evidence from the first trial to prove the same conduct. Because the defendant in *Grady* had already been prosecuted for the conduct offered for proof of the subsequent charges, the Court held that the second prosecution was barred by the double jeopardy clause. *Id.*

In fashioning its decision, the *Grady* Court expressly adopted the dicta of an earlier opinion, *Illinois* v. *Vitale*, 447 U.S. 410 (1980). In *Vitale*, the motor vehicle driven by the defendant struck and killed two children. *Id.* at 411. Vitale was convicted of failing to reduce speed to avoid an accident. *Id.* at 412. He was then tried a second time for involuntary manslaughter based on reckless driving. *Id.* at 413. The Court applied the *Blockburger* [v. *United States*, 284 U.S. 299 (1932)] test to the issue of double jeopardy. Successive prosecutions are constitutionally valid under the *Blockburger* test if the crime in each prosecution "requires proof of a fact which the other does not."[7] *Vitale*, *supra* at 416. When the prosecution is required to prove a separate set of facts in a subsequent prosecution, the defendant is not placed twice in jeopardy for the same offense. See *id.* In *Vitale*, the Court reasoned that if the charge of failure to reduce speed did not require proof of a fatality and, conversely, if the failure to reduce speed was not a statutory element of the involuntary manslaughter charge, then the defendant was not being tried twice for the same offense. *Id.* at 418-419. However, the *Vitale* Court cautioned that if the State found it "necessary to prove a failure to slow or to rely on conduct necessarily

[7]The *Blockburger* test is identical to the so-called *Morey* test applied by this court in double jeopardy cases to distinguish offenses under criminal statutes which do not address the question of consecutive punishments. *Morey* v. *Commonwealth*, 108 Mass. 433, 434 (1871). In light of double jeopardy concerns, if two offenses describe the same conduct, then we presume that the Legislature did not intend consecutive punishments. See *Commonwealth* v. *Alvarez*, 413 Mass. 224, 230-232 (1992). The *Morey* test has a long history in the common law of Massachusetts. *Id.*

involving such failure," then the defendant would have a double jeopardy claim "because [he] has already been convicted for *conduct* that is a necessary element of the more serious crime for which he has been charged" (emphasis added). *Id.* at 420.

In *United States* v. *Felix*, 112 S.Ct. 1377, 1384-1385 (1992), the Court limited its holding in *Grady*. The *Felix* Court held that "prosecution of a defendant for conspiracy, where certain of the overt acts relied upon by the Government are based on substantive offenses for which the defendant has been previously convicted, does not violate the Double Jeopardy Clause." *Id.* at 1380. Felix was prosecuted for attempting to manufacture drugs in Missouri, convicted, and subsequently tried in Oklahoma for manufacturing drugs and conspiracy to manufacture drugs. *Id.* at 1382. Despite the prosecution's use of the same evidence presented in the first trial, the Court held that the second prosecution was not barred by the double jeopardy clause. *Id.* at 1383, 1385. The *Felix* Court refused to read literally the "same conduct" test announced in *Grady*. *Id.* at 1383-1384. Although the Court acknowledged that the continuing criminal conduct offered as evidence in both trials was the same, the actual crimes charged in each case differed in both time and place, and, therefore, the Court held that the defendant was not tried twice for the same offense. *Id.* at 1382.[8] "[A] mere overlap in proof between two prosecutions," the Court explained, "does not establish a double jeopardy violation." *Id.* at 1382.

We read the *Grady* opinion as redefining the phrase "same offense" in the double jeopardy clause. *Grady* substitutes for "same offense" the phrase "conduct that constitutes an offense for which the defendant has already been prosecuted," *supra* at 510. This redefinition does not make *Grady* a "same transaction" test, rejected by this court in *Commonwealth* v. *Gallarelli*, 372 Mass. 573, 578 (1977), because the conduct

[8]With regard to the conspiracy charge, the court held that a substantive crime and a conspiracy to commit that crime are not the "same offense" for double jeopardy purposes. *United States* v. *Felix*, 112 S.Ct. 1377, 1384 (1992).

must also constitute a crime for which the defendant has already been tried. Thus, the narrow issue presented to us by *Grady* is whether in the second trial the Commonwealth proved conduct constituting an offense for which the defendant, Woods, had already been prosecuted. After reviewing the record, we hold that *Grady* does not apply.

Woods' acquittal in his first trial resolved only one factual issue: he was not driving while under the influence of alcohol.[9] In the second trial, the Commonwealth used the same evidence to prove that the defendant had been negligent. The crucial point for *Grady* purposes is that a reasonable jury could (and did) find the defendant negligent though not intoxicated. The two offenses were not the same. "Two offenses are not the 'same' within the meaning of the double jeopardy clause merely because they stem from the same conduct." *Costarelli* v. *Commonwealth*, 374 Mass. 677, 683 (1978), citing *Morey* v. *Commonwealth*, 108 Mass. 433, 434 (1871). Drinking before driving, although irresponsible and reprehensible, is not conduct that constitutes an offense for which Woods had been prosecuted. The Commonwealth offered evidence concerning alcohol, not to show that he drove while under the influence of alcohol or that he was legally "intoxicated," but to prove that he had been drinking before the accident as evidence of negligent operation of a motor vehicle. Evidence that the defendant was consuming alcohol prior to driving with passengers late at night is patently relevant to whether the defendant exercised reasonable care while driving. As the United States Supreme Court noted in *Felix*, "the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct," *supra* at 1383. If, on the other hand, the prosecution needed to show that the defendant was driving while intoxicated to prove negligent operation, i.e., the first offense was an essential element of the second, then the prosecution

[9]Because the defendant was acquitted on the issue of driving while under the influence of alcohol, he was entitled to a jury instruction on that point. After reviewing the trial judge's instructions, we believe they adequately protected the defendant's rights in this regard.

would be barred under Massachusetts law, see *Costarelli*, *supra* at 683 (double jeopardy bars subsequent prosecution for lesser included offense), as well as under *Grady*.[10] Cf. *Grady*, *supra* at 523. Thus, although the evidence presented at both trials was the same, the specific conduct at issue was not.

When viewed in light of the Commonwealth's two-tier trial system, see generally *Lydon* v. *Commonwealth*, 381 Mass. 356, cert. denied, 449 U.S. 1065 (1980), the defendant's double jeopardy claim is even less persuasive. The defendant asks this court to allow him to take advantage of a second opportunity for acquittal while simultaneously handicapping the prosecution's case against him. Unquestionably, the issue whether the defendant was driving while intoxicated has been resolved by his acquittal in the first-tier trial. That issue is precluded from the second-tier trial on double jeopardy grounds since an acquittal operates to end original jeopardy. G. L. c. 263, § 7. *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 308 (1984). The defendant, however, is mistaken in claiming that because double jeopardy bars retrial of the drunk driving charges, it necessarily precludes admission of any evidence used in the prosecution of those charges. This claim is without merit under Federal law, the law of the Commonwealth and common sense.

First of all, in our two-tier trial system, a defendant convicted of charges in the first-tier trial remains in "continuing jeopardy" until judgment is final in the second-tier trial. *Justices of Boston Municipal Court* v. *Lydon*, *supra* at 308.

[10]In his first trial Woods was acquitted of vehicular homicide while driving under the influence of alcohol but convicted of what was essentially the lesser included offense of vehicular homicide by negligent operation. Both charges require proof of negligent operation, but vehicular homicide while under the influence requires, additionally, proof of intoxication. G. L. c. 90, § 24G. Woods, therefore, was never acquitted of the lesser included charge. Unlike Grady, who in his second prosecution faced a new, more severe charge based wholly upon his conviction of a lesser included charge, Woods faced "continuing jeopardy" with regard to the lesser included charge, see *infra* this section, and never again faced prosecution for the greater offense.

Original jeopardy continues because the defendant may appeal any conviction automatically and need not plead error. G. L. c. 218, § 26A. *Justices of Boston Municipal Court* v. *Lydon*, *supra* at 304-305. Trial de novo is a unified process where, at the defendant's request, the previous judgment is "wiped out," and the case begins anew. *Mann* v. *Commonwealth*, 359 Mass. 661, 666 (1971). See also *Enbinder* v. *Commonwealth*, 368 Mass. 214, 217, cert. denied, 423 U.S. 1024 (1975), and cases cited. Thus, although original jeopardy for Woods with regard to the drunk driving charges terminated upon acquittal, he remained in continuing jeopardy with regard to the other offenses of which he was convicted. Any evidence of conduct which supported those original convictions naturally remains part of the continuing case and, therefore, cannot be barred on double jeopardy grounds.

Second, because the defendant remained in continuing jeopardy, he faced only one prosecution. Double jeopardy intervenes to protect defendants from facing multiple prosecutions for the same offense. "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Costarelli*, *supra* at 681, quoting *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). In *Grady*, the defendant was subjected to two separate prosecutions for the same offense. In the first trial he faced only misdemeanor charges; in the second, the government brought felony charges and based its case on the lesser included offenses of which he was convicted in the first trial. In stark contrast, Woods was not *prosecuted* twice but, rather, he himself chose to be *tried again* in the hope of securing acquittals to replace previous convictions.[11] There was

[11]The United States Supreme Court has repeatedly upheld the trial de novo system against double jeopardy claims. See *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 304-305 (1984). Moreover, the

no government oppression. See *Lydon* v. *Commonwealth*, *supra* at 366. In such circumstances, double jeopardy is not triggered. *Lydon* v. *Commonwealth*, *supra* at 356, 359-360, 365 (double jeopardy not implicated when defendant voluntarily chooses bench trial then trial de novo).

For these reasons, we hold that defendant's double jeopardy claim fails.

2. *Collateral estoppel.* The defendant argues that because he was found not guilty of driving while under the influence, the Commonwealth was precluded on collateral estoppel grounds from introducing in the second trial any evidence regarding his consumption of alcohol. He claims that the trial judge erred in denying his motion to exclude such evidence. For the reasons stated above, this claim is without merit.

The doctrine of collateral estoppel operates in criminal proceedings as part of the guaranty against double jeopardy. *Commonwealth* v. *Scala*, 380 Mass. 500, 503-504 (1980). Contrary to the defendant's claim, the doctrine has a narrow application: "[w]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Commonwealth* v. *Pero*, 402 Mass. 476, 477 (1988), quoting *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). It applies to factual issues, not evidence. See *Commonwealth* v. *Benson*, 389 Mass. 473, 478, cert. denied, 464 U.S. 915 (1983). As stated above, the only issue of fact foreclosed by the first trial was whether the defendant was driving while intoxicated. The Commonwealth was estopped from raising that issue in the trial de novo. "The doctrine of collateral estoppel will preclude either the subsequent prosecution or the introduction or argument of certain facts, only if the jury could not have based their verdict rationally on an issue other than the one the defendant seeks to foreclose." *Benson*, *supra* at 478. To prove negligent operation, the Commonwealth did not have to establish that the defendant was in-

State need not provide review of a bench trial beyond trial de novo. *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956).

toxicated. A jury could have reasonably inferred negligence from the circumstances of the accident as well as from evidence that the defendant was drinking without reaching further to decide whether or not he was intoxicated. Cf. *Pero, supra* at 478 (conviction upheld when reasonable basis existed for jury decision other than issue foreclosed by first trial). The charges of negligent operation and driving while under the influence involve distinctly separate factual issues. *Id.* at 478 (possession with intent to distribute drugs and conspiracy to traffic in drugs involve separate issues for collateral estoppel purposes). Collateral estoppel, therefore, does not bar the admission of evidence that this defendant consumed alcohol before the accident. *Commonwealth* v. *Kline*, 19 Mass. App. Ct. 715, 718-719 (1985) (although defendant found not guilty of failure to obey traffic signal, State not precluded at de novo trial from showing color of traffic signal at time of accident when issue was negligent operation).

We hold that the trial judge did not err in denying defendant's motion to exclude evidence on collateral estoppel grounds.

3. *Insufficient evidence.* The defendant asserts that the trial judge erred in failing to allow his motion for a required finding of not guilty based on insufficient evidence that the defendant was the operator of the motor vehicle at the time of the accident. After reviewing the record, we conclude that there was ample evidence to support a jury verdict.

A motion for a required finding of not guilty will be allowed only where "the evidence is insufficient as a matter of law to sustain a conviction on the charge." Mass. R. Crim. P. 25 (a), 378 Mass. 896 (1979). We review the evidence in the light most favorable to the prosecution to determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Commonwealth* v. *Latimore*, 378 Mass. 671, 677 (1979), quoting *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). We note further that a conviction may rest entirely upon circumstantial evidence. *Commonwealth* v. *Donovan*, 395 Mass. 20, 25 (1985). In this case, to prove that the defendant was operat-

ing the motor vehicle at the time of the accident, the prosecution offered testimony that (1) the defendant was found in the front seat of the car with his legs in the driver's side foot well; (2) his foot was wedged under the brake pedal; (3) his chest injuries were consistent with impact against the steering wheel; (4) the motor vehicle was owned by his father. We hold that a rational jury could infer from this evidence that the defendant was operating the motor vehicle.

4. *Rulings on evidence.* The defendant claims the trial judge committed reversible error when ruling on three evidentiary matters. First, he claims that evidence concerning the possession of marihuana by a person who was also found in the front seat of the motor vehicle was improperly excluded. He argues that such evidence is probative of who was operating the motor vehicle at the time of the accident. This argument presumes that from the mere evidence of possession the jury could have inferred that (1) the person ingested the marihuana; (2) the marihuana produced a degradation of his motor skills; (3) such a degradation of motor skills could have caused an accident similar to the one at issue here, and, therefore, (4) that person might have been driving. Such a chain of inference is very tenuous at best and, without any supporting evidence, approaches impermissible speculation at worst. It opens up collateral issues regarding the possession and use of marihuana among the passengers as well as stirring up prejudice. It is well within the trial judge's discretion to determine if the prejudicial effect of such evidence outweighs its probative value. *Commonwealth* v. *D'Agostino*, 344 Mass. 276, 279, cert. denied, 371 U.S. 852 (1962). The trial judge's determination stands, absent palpable error. *Commonwealth* v. *Dunn*, 407 Mass. 798, 807 (1990), and cases cited. Considering its limited probative value, we believe the trial judge committed no error by excluding such evidence. See *Commonwealth* v. *Scott*, 408 Mass. 811, 816 (1990) (admission of evidence of crimes committed by individuals other than the defendant will not be disturbed on appeal unless justice requires reversal).

Second, the defendant claims the trial judge erroneously denied his motion to exclude evidence concerning the identity of the motor vehicle's owner. He argues that such evidence was not probative of who was driving and was, in fact, unduly prejudicial. The defendant, however, fails to describe specifically what prejudice resulted from the admission of this evidence. He states that the jury could infer from this evidence that the defendant operated the motor vehicle because his father owned it. This inference, he claims, is impermissible. What the defendant has done is to imply that the probative aspect of the evidence is actually the unfair prejudicial element. We note that evidence is not prejudicial simply because it harms the defendant's case. Any evidence which "throws light" on an issue is properly admitted. *Commonwealth* v. *Palladino*, 346 Mass. 720, 726 (1964). Evidence that his father owned the motor vehicle makes it more likely than not that the defendant was in fact its driver. Without a showing that the prejudicial effect outweighs the probative value, relevant evidence is admissible.[13] *Green* v. *Richmond*, 369 Mass. 47, 59 (1975). Consequently, we conclude that there was no abuse of discretion in admitting this evidence.

Third, the defendant claims that the trial judge should have excluded evidence that the arresting officer handed the defendant's parents a citation for the defendant as impermissible opinion evidence, and his failure to do so shifted the burden of proof in violation of due process principles. We note, first of all, that the police were required to establish that a citation for the accident was given to the defendant or sent to his residence for the charge of operation after the suspension of a license, G. L. c. 90C, § 2 (1991 supp.), although the vehicular homicide charges carried no such requirement. Of course, the evidence could be used for purposes beyond

[13]We note here that the defendant cites in his brief an incorrect test for the admissibility of evidence. Even evidence which is barely probative may be, nonetheless, relevant and therefore admissible unless outweighed by prejudice to the defendant. See *Green* v. *Richmond*, 369 Mass. 47, 59 (1975).

the intent of the statute which might prove unfairly prejudicial to a defendant. In this case, however, the record clearly shows that the evidence regarding the citation was strictly circumscribed before and after the defense counsel's objection. No mention was made of the charges listed on the citation, and any prejudice involved in identifying who received the citation amounted to harmless error in light of the other evidence presented. We conclude, therefore, that there was no prejudicial error.

5. *Prosecutorial misconduct.* The defendant claims that the judge erred in not granting him a mistrial after the prosecutor made appeals to the sympathy of the jury. The defendant cites three specific incidents. After reviewing these incidents, we conclude that the defendant did not suffer undue prejudice, and therefore a mistrial was not warranted.

The defendant draws this court's attention first to the prosecution's closing argument. The prosecutor stated that the defendant was more "fortunate" than the other passengers who died in the accident. Although this statement surely evoked an emotional reaction, it did not require a mistrial. It is well within the trial judge's discretion to deny a mistrial on the ground of prosecutorial misconduct and to rely on appropriate curative instructions even in the case of intentional misstatements by the prosecution. *Commonwealth* v. *Charles*, 397 Mass. 1, 12 (1986). Of course, any claim of prejudice must be examined in the context of the trial. In this case, the statement accurately described the results of the accident. *Commonwealth* v. *Quigley*, 391 Mass. 461, 464 (1984), cert. denied, 471 U.S. 1115 (1985) (ironic statement based on the evidence not misconduct). Moreover, the prosecutor's statement concerning the deaths of two passengers was neither irrational nor irrelevant to the charge of vehicular homicide by negligent operation. *Commonwealth* v. *Clary*, 388 Mass. 583, 592 (1983) (extended characterization of the defendant as a lesbian constituted misconduct). *Commonwealth* v. *Shelley*, 374 Mass. 466, 470-471 (1978) (repeated ridicule of defendant's witnesses constituted misconduct). Furthermore, in labelling the defendant "fortunate"

the prosecutor was responding to defense counsel's own characterization of the defendant. To some extent, therefore, the prosecutor's words were intended to reframe the case for the jury.

Next, the defendant claims error in the prosecutor's argument that his recollection was that at the hospital the defendant asked only about "my truck" and not about the other passengers. Closing arguments are reviewed in light of jury instructions and the evidence presented during trial. *Commonwealth* v. *Lamrini*, 392 Mass. 427, 432 (1984). In this case, the issue of who was driving at the time of the accident was hotly contested. Defendant's statements concerning "my truck" were highly probative of that issue. Thus, the argument was not made solely to stir up resentment against the defendant. With regard to any prejudicial effect, the judge instructed the jury not to allow sympathy to control their decision and to view the closing statements as arguments but not evidence. Since the prosecutor was again relying on the evidence presented at trial and not his imagination, the jury instructions adequately responded to any injury the defendant may have suffered from this argument.

Lastly, the defendant strongly objects to the identification of the victims' parents in the courtroom. We agree with the defendant that such tactics which appeal solely to the sympathy of the jury should not be condoned. In the context of this trial, however, the defendant was not unfairly prejudiced. We note that defense counsel asked a witness on cross-examination to point out the *defendant's* parents, who were sitting in the courtroom. Furthermore, both the prosecution and defense counsel referred to the parents and families of the passengers and the defendant several times throughout the trial. Therefore, there was no error.

When mitigating factors were present at trial, and curative instructions were read to the jury, we defer to the judgment of the trial judge, who was in the better position to determine the prejudice to the defendant in the context of the trial. *Commonwealth* v. *Martino*, 412 Mass. 267, 281-282 (1992). We hold that these statements and actions by the prosecution

do not amount to prosecutorial misconduct requiring a mistrial.

For these reasons, we conclude that there were no prejudicial errors at trial, and, therefore, we affirm the convictions.

Judgments affirmed.

Appendix B.

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.	Worcester Jury of Six 90 JR 2718
Commonwealth of Massachusetts v. Eric Woods	Findings and Rulings regarding Defendant's motions *in limine*

RELEVANT PROCEDURAL FACTS

The defendant was initially charged by complaint in the Dudley District Court alleging: (a) operating under the influence of liquor; (b&c) two counts of violation of M.G.L. c. 90, § 24G(a) motor vehicle homicide while under the influence with negligent operation; (d&e) two counts of violation of M.G.L. c. 90, § 24G(b) motor vehicle homicide by negligent operation; (f) one count of negligent operation of a motor vehicle; (h) one count of a civil violation of the road for speeding; and (g) one count of operation after suspension for drunk driving. At a bench trial the defendant was acquitted of the charge of motor vehicle homicide while under the influence and driving negligently and operating under the influence. The judge dismissed the endangering count as duplicitous with the two vehicle homicide counts on which the judge found the defendant guilty. The judge also found the defendant responsible of speeding and operating after revocation for drunk driving.

The defendant appealed to the jury of six for a *de novo* trial on the two counts of motor vehicle homicide by negligent operation and operation after revocation. The case was transferred to me under the special assignment procedure established

by the regional justice for Region IV of the District Court Department. I have scheduled the matter for a jury trial to begin May 28, 1991.

At a time scheduled for pretrial conference and in open court the defendant filed two motions *in limine*, one motion which seeks to preclude the Commonwealth from introducing any evidence at trial concerning the defendant's drinking alcohol and the other which seeks to preclude the jury's hearing evidence concerning the ownership of the vehicle involved in the case.

At the pretrial conference I ordered the parties to submit written memoranda and I informed the parties that I would decide these motions before trial without the necessity of hearing further evidence.

FACTS RELEVANT TO DETERMINING THE MOTIONS

Based on the stipulation of the parties in a pretrial memorandum and the documents submitted by the parties in support of their respective positions and upon consideration of the representations contained therein and those made to me in court, I find the following facts.

The Commonwealth expects to present evidence that on November 16, 1989 the defendant and three companions were drinking together. At about midnight on November 17th a vehicle owned by the defendant's father collided with a tree on route 31 in the town of Dudley. It is expected that an accident reconstructionist will place the speed of the vehicle prior to impact at 72 miles per hour. The defendant was discovered at the scene at least partially in the operator's position with his legs pinned under the driver's side dash. The two passengers in the rear of the vehicle died. The surviving passenger who was in the front seat has no memory of the accident. There were

no eye witnesses to the accident. The defendant has not admitted operation.

In the first place the defendant contends that ownership of the vehicle is not relevant to the case. I conclude that it certainly is relevant under the circumstances and certainly "throws light" on one of the elements which the Commonwealth must prove *Commonwealth* v. *Palladino*, 346 Mass. 720 (at 720 & 726). 195 NE2d 769 (1964). I do not find such evidence to be so prejudicial that it would outweigh its relevance to the key issue. For this reason I rule that the defendant's motion to exclude evidence concerning the ownership of the vehicle involved in the accident should be and is, hereby, denied.

The defendant contends with regard to evidence of his drinking and the blood alcohol test results (.03) that it is prejudicial in the first place and that such evidence is to be precluded double jeopardy considerations.

The bench judge found that there was evidence to conclude the defendant was, beyond a reasonable doubt, negligent in the manner of his operation of the vehicle. The state of mind and the condition of the defendant at the time is relevant to the issue of negligence. I agree that the bench judge did not conclude from the evidence beyond a reasonable doubt that the defendant's ability to operate the vehicle in a way to respond promptly and effectively to unexpected emergencies was diminished by liquor. However, I also presume that the judge considered the defendant's drinking along with other considerations when he did find the defendant guilty of negligent operation. The elements of the crime of negligent operation are similar to but not the same as those for OUI and so I find that the relevant evidence of the defendant's drinking is not precluded by double jeopardy or by considerations of prejudice.

BOTH OF THE DEFENDANT'S MOTIONS *IN LIMINE* ARE HEREBY DENIED.

Dated: May 3, 1991

Elliott L. Zide, trial judge